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IN THE HELENA MUNICIPAL COURT, CITY OF HELENA
BEFORE ROBERT WOOD, MUNICIPAL COURT JUDGE

THE CITY OF HELENA, Plaintiff, -vs- MARK ALLEN LEE, Defendant.	Cause No. 2013-NT-5172 **BRIEF IN SUPPPORT OF MOTION TO RESCIND APPOINTMENT IN PENDING CASE AND IN ADDITIONAL CASES**

William F. Hooks, Chief Public Defender, respectfully submits this Brief in support of the motion to rescind the order that the Office of the Public Defender assign counsel in this case, and halt the assignment of any additional cases for a period of time to be determined.

I. Excessive Caseloads Violate the Constitutional Rights Of Criminal Defendants And Prevent Public Defenders From Complying With Their Constitutional and Ethical Obligations

A. The Constitutional Right to Assistance of Counsel

The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, requires that "counsel must be provided for defendants unable to employ

counsel[.]" Gideon v. Wainwright, 372 U.S. 335, 341 (1963). Article II, § 24 of the Montana Constitution also guarantees the right to the assistance of counsel. State v. Garcia, 2003 MT 211, 317 Mont. 73, 75 P.3d.[1] The right to counsel for the indigent also applies to one facing possible jail time for misdemeanor offenses, Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); State v. Buck, 2006 MT 81, ¶ 33, 331 Mont. 517, 134 P.3d;[2] suspended sentences, Alabama v. Shelton, 535 U.S. 654, 658 (2002) ("We hold that a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged." (quoting Argersinger, 407 U.S. at 40)); and juvenile or youth court proceedings. In re Gault, 387 U.S. 1, 41 (1967).

"'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.'" United States v. Cronic, 466 U.S. 648, 654 (1984) (footnote omitted).

The right to counsel in a criminal proceeding attaches when a prosecution is commenced. Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008); State v. Scheffer, 2010 MT 73, ¶ 16, 355 Mont. 523, 230 P.3d 462. The right includes the plea bargain negotiation stage. The United States Supreme Court has "long recognized that the negotiation of a plea

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[1] Montana has long recognized the right to counsel. Article III, § 16 of the 1889 Montana Constitution guaranteed the right to counsel: "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel[.]" In a case which preceded *Gideon*, the Court forcefully articulated the nature of the state constitutional right to counsel. *See*, State v. Blakeslee, 131 Mont. 47, 54-55, 306 P.2d 1103, 1107 (1957).

[2] Section 46-8-101, MCA sets out the statutory right to counsel.

bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." Padilla v. Kentucky, 559 U.S. 356, ___, 130 S.Ct. 1473, 1486 (2010). Thus, a defendant's right to counsel extends to plea negotiations. Missouri v. Frye, ___ U.S. ___, 132 S. Ct. 1399, 1407 (2012); State v. Edwards, 294 P.3d 708, 715 (Wash. Ct. App. 2012). It is not enough to overlook problems and hope that the accused gets a fair trial. "Because ours is for the most part a system of pleas, not a system of trials... it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." Frye, 132 S. Ct. at 1407 (internal citations and quotation marks omitted). "[C]riminal defendants require effective counsel during plea negotiations." 132 S.Ct. at 1407-08.

The right to counsel in certain non-criminal cases is guaranteed by the Due Process Clause. The Due Process Clause of the Montana Constitution guarantees parents effective assistance of counsel during termination of parental rights proceedings. In re A.S., 2004 MT 62, ¶ 20, 320 Mont. 268, 87 P.3d 408.[3] The court also has held, based on Article II, Section 17, of the Montana Constitution and Title 53, Chapter 21, MCA, that the right to counsel provides

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[3] As the United States Supreme Court has recognized:

> The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.
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> Santosky v. Kramer, 455 U.S. 745, 763 (1982).

an individual subject to an involuntary commitment proceeding the right to effective assistance of counsel. In re Mental Health of C.R.C., 2009 MT 125, ¶ 15, 350 Mont. 211, 207 P.3d 289.

B. The Rights of the Accused Must Be Protected

Courts have a duty to protect the right to counsel. "Any defendant that has exercised his right to counsel is guaranteed effective assistance of counsel, and courts should do the utmost to protect the defendant's right to adequate and competent representation." State ex rel. Wolfrum v. Wiesman, 225 S.W.3d 409, 412 (Mo. 2007).

C. Excessive Workloads Preclude Effective Assistance

Effective assistance of counsel means "that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients." State v. Peart, 621 So. 2d 780, 789 (La. 1993).

In State v. Couture, 2010 MT 201, ¶ 76, 357 Mont. 398, 240 P.3d 987, the Montana Supreme Court agreed with an American Bar Association standard which mandates that

> Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations. Defense counsel should not accept employment for the purpose of delaying trial.

American Bar Association, Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed., ABA 1993), Standard 4-1.3(e).[4]

Defense attorneys fundamentally have a duty to protect the rights of the accused. ABA Standard 4-3.6 provides that "[d]efense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges."

Defense attorneys have a duty to investigate, which exists regardless of the accused's admissions or statements. ABA Standard 4-4.1 (a) provides that "defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated

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[4] The ABA's *Ten Principles of a Public Defense Delivery System,* Principle 5 with Commentary (Feb. 2002) imposed a similar requirement:

> **Defense counsel's workload is controlled to permit the rendering of quality representation.** Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

desire to plead guilty." ABA Standard for Criminal Justice, Pleas of Guilty, Standard 14-3.2 likewise mandates an appropriate investigation.

Defense attorneys may properly advise the accused only after conducting an appropriate investigation. ABA Standard 4- 5.1(a) provides: "After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome."

Excessive workload makes impossible representation consistent with the mandates of state and federal constitutions and *Gideon*. Due to workload issues, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." United States v. Cronic, 466 U.S. 648, 659-660 (1984). As noted in State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984), "[t]he insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads."

II. The Montana Rules of Professional Conduct Prohibit Excessive Caseloads that Can Cause a Public Defender to Breach His or Her Professional Obligations

All attorneys are bound by Montana's rules of professional conduct, and all are subject to the disciplinary jurisdiction of the Montana Supreme Court. Discipline, up to and including disbarment, may be imposed for any of a number of reasons, including "[a]cts or omissions by a lawyer… which violate the Rules of Professional Conduct or the disciplinary rules adopted

from time to time by the Supreme Court." 2011 Rules for Lawyer Disciplinary Enforcement, Rules 7, 8(a).

The rules apply with equal vigor to managers and staff attorneys in OPD. Montana Rule of Professional Conduct (MRPC) 5.1(a) states that a lawyer who has "managerial authority" comparable to that of a law firm partner "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." A manager having "direct supervisory authority over another lawyer shall make reasonable efforts to ensure" that the other lawyer conforms to the ethics rules. MRPC 5.1(b).[5]

Staff attorneys are bound to comply with the ethics rules even if acting "at the direction of another person." MRPC 5.2(a). Rule 5.2(b) provides that a staff attorney does not violate the Rules of Professional Conduct if the lawyer acts in accordance with the supervisory lawyer's "reasonable resolution of an arguable question of professional duty." If the question is "reasonably arguable," the authority to decide the course of action "ordinarily reposes in the supervisor, and a subordinate may be guided accordingly." Comment 2, Model Rule of Professional Conduct 5.2.

Attorneys have an obligation to provide competent representation, which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the

[5] A public defender agency is the equivalent of a law firm for purposes of ethics rules. MRPC Rule 1.0 (e).

representation." MRPC 1.1. MRPC 1.2 requires that the attorney abide by certain client decisions, and consult with the client.[6]

Counsel must act with diligence. MRPC 1.3. Comment 2 to Model Rule 1.3 states "[a] lawyer's work load must be controlled so that each matter can be handled competently."

An attorney has an affirmative obligation to communicate with his or her client. Duties regarding communication include the obligations to keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information. MRPC 1.4.

Counsel must avoid conflicts of interest. MRPC 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The constitutional rights to counsel also guarantee that the representation afforded to indigent persons be free of conflict. "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 272 (1981).[7] An excessive caseload may

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[6] MRPC 1.2 states, in part, that "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

[7] Counsel's representations regarding the existence of a conflict should be embraced by the court. "An attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.... Second, defense attorneys have the obligation, upon

give rise to a conflict of interest. See, In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1135 (Fla. 1990) ("When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created."); In re Edward S., 92 Cal. Rptr. 3d 725, 746-747 (Cal. App. 1st Dist. 2009)(" a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing"); People v. Roberts, 2013 COA 50 (Colo. Ct. App. 2013).

In State ex rel. Mo. Pub. Defender Comm'n v. Waters, 370 S.W.3d 592, 608 (Mo. 2012), the court observed the following:

> No exception exists to the ethics rules for lawyers who represent indigent persons. To the contrary, as the American Bar Association has aptly noted, there is an "implicit premise that governments, which establish and fund providers of public defense, never intended that the lawyers who furnish the representation would be asked to do so if it meant violating their ethical duties pursuant to professional conduct rules." Am. Bar Ass'n, Eight Guidelines of Public Defense Related to Excessive Workloads, August 2009, at 11. For this reason, "public defenders are risking their own professional lives" when appointed to an excessive number of cases.

MRPC Rule 1.16 requires that an attorney shall not represent a client if "the representation will result in violation of the rules of professional conduct or other law[.]" Comment 1 to Rule 1.16 states: "[a] lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to

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discovering a conflict of interests, to advise the court at once of the problem. Finally, attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath." Holloway v. Arkansas, 435 U.S. 475, 485-486 (1978) (citations and internal quotation marks omitted).

completion." The ABA has issued a formal opinion which also requires withdrawal. See, ABA Comm. on Ethics & Prof'l Responsibility, Ethical Obligations of Lawyers Who Represent Indigent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation, Formal Op. No. 06-441 (2006) (ABA Opinion).

III. The Court Should Grant Systemic Prospective Relief, Rather than on a Piece-Meal Basis

A. Systemic Relief

The myriad problems created by the excessive caseloads are region-wide. These problems are not isolated. Region Four attorneys regularly are unable to perform the necessary and required duties. This Court should grant systemic relief, rather than by requiring that a motion be filed in each case. As the Florida Supreme Court observed in reaffirming that systemic motions are appropriate, "[i]n extreme circumstances where a problem is system-wide, the courts should not address the problem on a piecemeal case-by-case basis. This approach wastes judicial resources on redundant inquiries." Public Defender, Eleventh Judicial Circuit v. State, 155 So.3d 261, 274 (Fla. 2013). Clogging the court system with numerous individual motions would be "tantamount to applying a band aid to an open head wound." *Ibid.*

B. Prospective Relief

The U.S. Supreme Court has cautioned that "the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The

Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." Avery v. Alabama, 308 U.S. 444, 446 (1940). It is vital that effective representation be provided prior to trial. Indeed, "the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." Maine v. Moulton, 474 U.S. 159, 170 (1985).

The pending motion is premised on the representation that Region Four public defenders are unable to provide the level of representation demanded by the state and federal constitutionals and rules of ethics. These representations assert a basic, fundamental denial of the right to counsel. Thus, this Court may grant relief now, and need not wait until after disposition, and then require the defendant to pursue some action for post-conviction relief. "The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the 'ineffectiveness' standard may nonetheless violate a defendant's rights under the sixth amendment." Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988).

Granting relief at this stage will promote judicial efficiency and economy. "[T]reating ineffective assistance claims before trial where possible will further the interests of judicial economy ... It will also protect defendants' constitutional rights, and preserve the integrity of the trial process. It matters not that the ineffective assistance rendered may or may not affect the outcome of the trial to the defendant's detriment." State v. Peart, 621 So. 2d 780, 787 (La. 1993). The Florida Supreme Court recently concurred with this approach, and held that the trial courts could address claims of ineffective assistance before trial. Public Defender,

Eleventh Judicial Circuit v. State, 115 So.3d 261, 275-78 (2013). The Court noted that in recent decisions, the U.S. Supreme Court rejected states' arguments that because the accused eventually had a fair trial, he had not been prejudiced by counsel's pre-trial ineffective assistance. 115 So.3d at 278-79, discussing Missouri v. Frye, *supra,* 566 U.S. at ___, 132 S. Ct. at 1407; Lafler v. Cooper, *supra,* 566 U.S. at ___, 132 S. Ct. at 1388 ("[I]t is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process").

Thus, the Florida Supreme Court concluded the proper standard for showing prejudice required for withdrawal from cases by the public defenders when based on an excessive caseload is the showing set out in ethical rule 1.7: "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client[.]" 115 So.3d at 279.

IV. The Court Has Inherent Authority to Grant Relief

"[E]nforcement of a clear constitutional or statutory mandate is the proper work of the courts[.]" Hurrell-Harring v. State of New York, 930 N.E.2d 217, 227 (N.Y. 2010). There, the court noted how "odd" it would be if it "made an exception in the case of a mandate as well-established and as essential to our institutional integrity as the one requiring the State to provide legal representation to indigent criminal defendants at all critical stages of the proceedings against them." *Ibid.*

Section 3-1-113, MCA, confers on courts an inherent authority to act. "When jurisdiction is, by the constitution or any statute, conferred on a court or judicial officer, all the

means necessary for the exercise of such jurisdiction are also given. In the exercise of this jurisdiction, if the course of proceeding is not specifically pointed out by this code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." *See also* State v. Brummer, 1998 MT 11, ¶ 38, 287 Mont. 168, 953 P.2d 250 (courts of common law jurisdiction may exercise inherent powers). The concept of inherent powers implies that "its use is for occasions not provided for by established methods." State ex rel. Hillis v. Sullivan, 48 Mont. 320, 329, 137 Pac. 392, 395 (1913). The Montana Supreme Court has held that inherent power be exercised only when established methods fail or an emergency arises. Clark v. Dussault, 265 Mont. 479, 486, 878 P.2d 239, 243 (1994).

The Minnesota Supreme Court recently reiterated that "safeguarding the rights of criminal defendants is a historical and constitutional function of the judicial branch." State v. Randolph, 800 N.W.2d 150, 159 (Minn. 2011) (citing cases). The Court concluded it had inherent authority to act. "In the absence of legislative action to adequately implement the right to appellate counsel in misdemeanor appeals, it is our responsibility to act.... We are the first line of defense for individual liberties[.]" *Ibid* (internal quotation marks and citations omitted). *See also*, State ex rel. Fitas v. Milwaukee County, 221 N.W.2d 902, 904-05 (Wis. 1974) ("It is within the inherent power of the courts to appoint counsel for indigents"); Arey v. State, 929 A.2d 501, 512 (Md. App. 2007) (" the Circuit Court has the inherent power to appoint counsel to represent a petitioner when the court believes counsel would be necessary to further the interest of justice.")

This Court has both the inherent authority and the constitutional mandate to act, and to grant the relief requested.

V. Conclusion

In brief, Region Four of the Office of the Public Defender is in a state of crisis not of its own making. The staff attorneys in Region Four simply have too many cases to handle in a manner dictated by constitutional, ethical and statutory mandates. Immediate relief is necessary to protect the constitutional rights of the persons who are entitled to the effective assistance of counsel in matters before this Court. Therefore, the undersigned respectfully submits that the Court should grant the relief requested in the Motion.

DATED this 5th day of September, 2013.

WILLIAM F. HOOKS
Chief Public Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing motion was duly served upon Helena City Attorney Jeff Hindoien by delivering a copy to the City Attorney's Office at 316 N Park, Helena, MT 59601 via inter-office mail on the 5th day of September, 2013.